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Adopting an enabling legal environment for the operation of micro, small and medium-sized enterprises (MSMEs)

Note by the Secretariat

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Introduction

1. The current revision of the document on adopting an enabling legal environment for the operation of micro, small and medium-sized enterprises (MSMEs) is based on the deliberations and decisions of Working Group I at its thirtieth session (New York, 12 to 16 March 2018).

2. In order to be consistent with the final form in which the document will be published, guidance to the changes arising from the thirtieth session of the Working Group is not reflected in footnotes to the text and the Commission might wish to refer to the report of that session (A/CN.9/933).

3. In the final version of the document, text along the following lines will be inserted into the preface:

> "*In light of the disadvantaged position in which many micro, small and medium-sized enterprises (MSMEs) are found globally, UNCITRAL, at its forty-sixth session in 2013, decided to commence work on reducing the legal obstacles faced by MSMEs throughout their life cycle, and in particular, specified that such work should focus on MSMEs in developing economies. In taking up this topic, UNCITRAL decided to focus its attention, at least initially, on the reduction of legal obstacles that MSMEs face at the beginning of their life cycle*".

4. The text of the document on adopting an enabling legal environment for the operation of MSMEs is reproduced as an Annex to this introduction.

Annex

Adopting an enabling legal environment for the operation of micro, small and medium-sized enterprises (MSMEs)

Introduction

1. The work of UNCITRAL on micro, small and medium-sized enterprises (MSMEs) aims at facilitating the formalization and operation of such enterprises throughout their life cycle. Undertaking this work emphasizes the relevance and importance of UNCITRAL in the promotion of the rule of law at the national and international levels and for the implementation of the international development agenda. UNCITRAL's work also supports the achievement of the Sustainable Development Goals, which build upon the successes of the Millennium Development Goals, and which specifically note the encouragement of the formalization and growth of MSMEs in target 3 of goal 8 to "Promote inclusive and sustainable economic growth, employment and decent work for all". By focusing on the legal environment for the operation of MSMEs, UNCITRAL's work is intended to be applicable to all States, regardless of the level of development of the local economy.

2. The global community has recognized the importance of fair, stable and predictable legal frameworks for: generating inclusive, sustainable and equitable development, economic growth and employment; stimulating investment; and facilitating entrepreneurship, as well as UNCITRAL's contribution to the attainment of those goals through its efforts to modernize and harmonize international trade law.[1] Work aimed at supporting and fostering the establishment and growth of MSMEs further underpins UNCITRAL's contribution in providing internationally acceptable rules in commercial law, and supporting the enactment of those rules to assist in strengthening the economic fibre of States.

3. To accompany UNCITRAL's work programme on adopting an enabling legal environment for the operation of MSMEs, this text serves as an introduction and overarching framework for UNCITRAL's current and future work on MSMEs. This contextual framework is underpinned by the legal standards developed to provide legislative pillars; importantly, such an approach could accommodate expansion through the addition of other legislative texts regarding MSMEs as such texts might be adopted by the Commission. This work is further underpinned by texts already developed by UNCITRAL, such as the Model Law on Secured Transactions (2016), which seeks to increase access to credit at affordable rates, and the Model Law on Public Procurement (2011), which promotes access to and participation of small and medium-sized enterprises (SMEs), a subset of MSMEs, to public procurement markets. MSMEs will benefit from other work, including UNCITRAL's electronic commerce texts.[2] Taken in conjunction, current and future work by UNCITRAL will assist in creating a legal and regulatory framework that can best support entrepreneurs and MSMEs in establishing business rights, thereby reducing some of the legal obstacles that such businesses face.

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[1] See, for example, "Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels", United Nations General Assembly resolution A/RES/67/1 (67th session, 2012), para. 8, and "Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)", United Nations General Assembly resolution A/RES/69/313 (69th session, 2015), Annex, para. 89.

[2] Such texts include the UNCITRAL Model Law on Electronic Commerce (1996), the UNCITRAL Model Law on Electronic Signatures (2001) and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).

I. Micro, small and medium-sized enterprises (MSMEs)

4. The international community has underscored the importance of business law as one of four pillars key to strengthening the legal empowerment of the poor, many of whom rely upon micro and small businesses for their livelihood. In addition to other pillars (such as access to justice and the rule of law; property rights; and labour rights), business rights are seen as important to empower the less advantaged, not only in terms of their employment by others, but also in developing micro and small businesses of their own. Business rights may be regarded as a composite of existing rights of groups and individuals to engage in economic activity and market transactions, and which include the right to start a business in the formal economy without facing arbitrarily enforced regulations or discrimination, removing unnecessary barriers that limit economic opportunities, and protecting business investments, regardless of their size. Measures that have been called for to strengthen business rights include:

(a) Guaranteeing basic business rights, including the right to sell, the right to have a workspace and the right to have access to the necessary infrastructure and services (for example, to electricity, water and sanitation);

(b) Strengthening, and making effective, economic governance in order to permit entrepreneurs to easily and affordably establish and operate a business, to access markets, and to exit a business;

(c) Expanding the accessibility for entrepreneurs of limited liability entities and other legal mechanisms that allow owners to separate their business and personal assets;

(d) Promoting inclusive financial services that offer savings, credit, insurance, pensions and other tools for risk management; and

(e) Expanding the access of entrepreneurs to new business opportunities through specialized programmes to familiarize entrepreneurs with new markets, assisting them in creating links with other businesses of all sizes, and in complying with regulations and requirements.

A. The importance of MSMEs in the global economy

5. UNCITRAL's decision to work on reducing the legal obstacles faced by MSMEs recognizes the importance of such enterprises to the economic health of the States in which they are found, and to the global economy more generally. This importance is underscored by a number of key facts that illustrate that MSMEs are seen as the backbone of the economy in both the developed and the developing world.

6. The total number of MSMEs worldwide is estimated to be around 500 million, of which approximately 85 per cent are in emerging markets. Statistics for SMEs indicate that such businesses account for over 70 per cent of total employment and 64 per cent of Gross Domestic Product (GDP) in developed economies, and approximately 45 per cent of employment and 63 per cent of GDP in low-income countries.[3]

7. While MSMEs are of great importance in regions of the world where a large number of developing States are found, it may be instructive to note that MSMEs constitute the vast majority of business types in all States. Even in the most developed economies, upwards of 90 per cent of all business are MSMEs, or which 90 per cent are microenterprises.

[3] "IFC Jobs Study: Assessing Private Sector Contributions to Job Creation and Poverty Reduction", 2013, pp. 10–11 (https://www.ifc.org).

B. Defining MSMEs

8. There is no standardized international definition of what constitutes an MSME, since each economy will define its own parameters for each category of business size by taking into account its own specific economic context.[4] For that reason, it is not necessary or advisable for UNCITRAL to seek consensus on a definition for each category of MSME, since any legislative texts produced will be applied by States or regional economic groups to MSMEs in accordance with their own definitions, based on each unique economic context. The important common factor from State to State is that MSMEs, regardless of how they are defined, are enterprises that, by virtue of being the smallest and most vulnerable, face a number of common obstacles irrespective of the particular jurisdiction in which they are found.

C. The nature of MSMEs

9. MSMEs are incredibly varied in nature. They may consist of sole entrepreneurs, small family businesses or larger enterprises with several or many employees, and may operate in virtually any commercial sector, including in the service industry and the artisanal and agricultural sectors.

10. Moreover, MSMEs may be expected to vary depending on the local economic conditions, cultural traditions and the different motivations and characteristics of the entrepreneurs establishing them. Enterprises that operate in the formal economy may also take various legal forms, depending on the options available to them under applicable law, and on how those different forms may meet their needs.

11. In addition, although MSMEs may be seen, particularly in the context of developing economies, mainly as a source of livelihood for the working poor, such enterprises need not be static; in fact, MSMEs may also serve a dynamic purpose as a source of entrepreneurial talent in an economy. Indeed, their importance in the world economy suggests that providing for and fostering the growth of MSMEs is a key goal in order to achieve economic progress, innovation and success.

12. However, despite their disparate nature and size, certain possible characteristics of MSMEs may be broadly shared, such as:

(a) Small size; they are and remain small operations;

(b) Disproportionate impact of burdensome regulatory hurdles;

(c) Reliance on family and friends for loans or risk-sharing;

(d) Limited access to capital or to banking services;

(e) Limited source of employees; if any, they are often drawn from family and friends and may be unpaid and unskilled, including having limited administrative capacity;

(f) Limited markets; these may comprise only relatives, close friends and local contacts;

(g) Vulnerability to arbitrary and corrupt behaviour;

(h) Limited access to dispute settlement mechanisms, which puts them at a disadvantage in disputes with the State or with larger businesses;

[4] States may wish to note the definitions of the different categories of businesses included in MSMEs that have been established either by various States or by regional economic groups. Those definitions tend to be based on a number of elements, considered separately or along with other factors, including: (i) the number of employees at a specific point in time, such as the end of the financial or calendar year; (ii) the amount of annual revenue or turnover generated by the enterprise, or the balance sheet total of the business; (iii) the asset base of the business; (iv) the total monthly wages paid by the enterprise; or (v) the amount of capital invested in the enterprise.

(i) Lack of ability to partition assets, so business failure often means that personal assets are also lost;

(j) Vulnerability to financial distress; and

(k) Difficulty in transferring or selling a business and in profiting from both tangible and intangible assets (such as client lists or relationships with customers).

D. Creating sound business environments for all businesses

13. Efforts to assist MSMEs at the start of their life cycle might first begin with consideration of the business environment in which an MSME will be conducting its affairs. A "business environment" may be defined in a number of different ways, but could be said to comprise the policy, legal, institutional and regulatory conditions that govern business activities, and the administration and enforcement mechanisms established to implement government policy, as well as the institutional arrangements that influence the way key actors operate. These key actors may include government agencies, regulatory authorities, business organizations, trade unions, and civil society organizations. All of these factors affect business performance.

14. Sound business environments can have a positive influence on economic growth and poverty reduction. While views differ as to the significance and measurability of the link between the business environment, on one hand, and economic growth and poverty reduction, on the other, poor business environments are unlikely to provide sufficient incentives and opportunities for entrepreneurs to carry on their commercial activities in the formal economy. In addition, poor business environments tend to be more susceptible to corruption and usually have a disproportionate gender impact, since the businesses most vulnerable in a weak business environment are micro-businesses, which are often owned by women.[5]

15. It should be noted that the quality of the business environment varies not only as between States, but also within the different regions of those States. Such regional variations make it unlikely that a single solution will provide the answer for improving the business environment in every State. Similarly, the challenges faced by MSME entrepreneurs vary depending on the context in which they are doing business. However, the two concepts are linked, since many of the challenges faced by MSMEs are similar to those considered detrimental to a favourable business environment in general, including: burdensome regulation and taxation rates, high economic inequality, low institutional quality, low quality of public infrastructure, and a lack of access to credit and other resources.

16. Improving the quality of the business environment and assisting MSMEs in overcoming the particular challenges facing them often require a State to take measures towards legal and policy reform. These reforms may include, among others, providing for a simple and effective system of registration with those public authorities with which a business may be required to register (which may include the business registry, as well as taxation and social security authorities), as well as providing for a range of simplified and flexible legal forms for business so as to meet the varied needs of MSMEs. States most often initiate such reforms in order to: facilitate business start-up and operations, stimulate investment opportunities, and increase growth rates and employment. Such reforms require careful planning and commitment on the part of the State, as well as the involvement of many different entities at various administrative and governmental levels.

[5] The draft legislative guide on key principles of a business registry (A/CN.9/WP.940) provides greater detail on the challenges faced by women running micro-businesses.

II. MSMEs in the informal economy

17. As outlined above in paragraph 12, MSMEs generally face a number of key challenges, some of which are caused, and many of which are exacerbated, by operating in the informal economy. While developing States host the largest percentage of the number of MSMEs in business globally, the vast majority of these enterprises operate in the informal economy. Moreover, the percentage of MSMEs operating in the informal economy is likely to grow. Although SMEs that are operating in the informal economy are estimated to provide nearly half of all jobs in developing States and a quarter in developed States, they account for only around 35 per cent and 15 per cent of the GDP, respectively, in those economies.[6]

18. "Informality" is by no means a uniform concept. Many businesses that might be considered "informal" actually operate in fixed premises and according to locally accepted commercial rules. In addition, they may be well-known by local authorities, pay some form of local taxes, and may even engage in cross-border trade. Others, on the other hand, may have little interaction with the State.

19. Although measurement tools are imperfect and no clear boundaries exist between formal and informal sectors, businesses can be viewed as operating on a formality-informality spectrum, according to the extent to which their operations fall within the ambit of a State's official laws or take place outside its official structures. The term "formal economy" in these materials thus refers to the sector of the economy characterized by activities that are conducted within the ambit of formal regulation and structure, and commercial activity that falls outside of this scope will be referred to as "informal". Moreover, since the entry point for businesses wishing to access the formal economy is often by way of mandatory registration with certain public authorities (often the business registry, as well as taxation or social security authorities), informal enterprises will refer to those that have not complied with mandatory registration with the authorities as required by the applicable law of the State. Mandatory registration with those public authorities will be considered in these materials to be the main conduit through which businesses are encouraged to operate in the formal economy. However, it should be noted that in some States, certain businesses (due to their size and legal form) are not required to register with the business registry, taxation or social security authorities, and provided those businesses fulfil other mandatory requirements, they are regarded as operating in the formal economy.

20. In addition, the informal economy is not related to illegal or criminal activity. Illegal activities are contrary to the law, but informal activities are extralegal, in that they are not officially declared and occur outside the legal and regulatory regime that should govern such activities. The discussion in these materials is limited to extralegal commercial activities and does not address illicit trade in goods or services.

21. Further, informal commercial activity may be mainly of a different nature in some States, such as in developed economies. In such States, the informal economy may consist mainly of firms and workers that underreport their income to tax authorities, or that use undeclared labour in certain business domains. These types of informal activities are not the focus of these materials.

22. It is also important to note that although informal commercial activity, particularly in the developing world, may exist largely as a result of economic necessity (as noted above in respect of MSMEs in general, see para. 11) components of the informal economy may also be seen as quite dynamic and as an incubator for business potential that in fact provides economies with a large number of potential contributors to business development. In fact, businesses operating in the informal economy may be seen to provide a pool of talent and an important base of operations from which entrepreneurs can access, and graduate into, the formal economy. In that

[6] Supra, note 4

regard, the informal economy should not be considered a marginal or peripheral sector, but rather as an important building block of a State's overall economy.

23. The institution of reforms to improve the business environment, as noted above in paragraphs 13 to 16, may encourage and facilitate the operation of enterprises in the formal economy. However, in order to achieve success, policies encouraging businesses to operate in that economy should take into account the different motivations and characteristics of entrepreneurs operating in the informal sector, and ensure sufficient incentives are offered to encourage them to operate in the formal economy. An entrepreneur's reasons for operating a business in the informal sector will vary depending on the economy, but may include: high entry barriers and costs (including taxes and other social contributions) that outweigh the benefits that can be expected from entering the formal economy; lack of information required to access the formal economy; and a lack of job opportunities in the formal economy.

24. Variations in the size and characteristics of the informal economy are also apparent from region to region. In some regions, for example, high levels of informal commercial activity may be partially due to the fact that the informal economy is where most new jobs are found, and where many entrepreneurs must trade by necessity. In such a region, a job, an enterprise and a household may be the same thing, and lack of entrepreneurial skills, access to credit, and infrastructure are seen as the most obvious constraints to growth. In other regions, the informal sector tends to behave like a typical small business sector, and is often the main entry point for young, uneducated workers seeking employment, as well as for those seeking part-time work. Other regions have experienced growth of the informal economy in recent years, apparently driven by a lack of jobs in the formal sector and reduced demand for goods and services from those employed in that sector.

25. The debate on the reasons for the informal sector, on its effect on national economies and on how to approach the issue has been vibrant for decades and has in recent years had a major influence on policymaking. The view that informal commercial activity is the result of burdensome regulation and costly procedures required by the State for businesses to enter the formal economy, and that a reduction of those barriers will help informal MSMEs move towards a higher degree of compliance with mandatory registration requirements, has generated momentum for reforming regulations and laws in order to simplify business entry into the formal economy. A wide array of policies has been designed and implemented in several States and regions of the world, since, as noted earlier, the variable nature of the informal sector, and the different levels of development of States, render elusive the identification of a single optimal approach. The most successful interventions have been comprehensive policy packages aimed at achieving various goals, such as economic growth, social protection and inclusion, and which often involve:

(a) Reducing the costs of a business entering and operating in the formal sector, which include entry costs, taxes, fees and social contributions, and costs of compliance;

(b) Improving the benefits of operating in the formal economy by reducing the bureaucracy and expense involved in obtaining fixed premises, and providing access to business development services and new markets;

(c) Improving the general business environment, so that policies to reduce costs and to improve the benefits of entering the formal economy also assist firms already operating in that sector; and

(d) Strengthening the enforcement of a State's legal regime in order to encourage operation in the formal economy.

III. Ensuring that operation in the formal economy is simple and desirable for MSMEs

26. In order to encourage MSMEs to operate their business in the formal economy, States may wish to consider how best to effectively convey to MSMEs the availability of and the advantages offered by that approach. In addition, States should also consider what steps they can take to motivate such behaviour by making it a desirable, easily accessible process that will impose the least burden possible on MSMEs.

A. Explaining the meaning of operating in the formal economy

27. To ensure widespread understanding of the advantages available to MSMEs, steps must be taken to explain the meaning of participating in the formal economy and to provide clear and accessible information on how to achieve that aim. The State should consider how best to effectively convey relevant information to MSMEs, including on the necessary requirements in their jurisdiction and how such businesses can fulfil them, and any other information necessary for them to operate in the formal economy. In addition to advising on the benefits of operating in the formal economy, information should also be provided on the types and advantages of the legal forms that are available to a business, and the public authorities with which registration might be necessary (e.g. business registration, taxation and social security authorities). Ideally, a business should be able to use a single physical or electronic interface (a "one-stop shop") to register simultaneously with all necessary public authorities.[7] Information in respect of these matters should be specifically adapted so that it is tailored to and clear and easily understandable by the target audience.

1. The advantages of the formal economy

28. Part of the message that must be conveyed to MSMEs in order to persuade them to operate their businesses in the formal economy is an explanation of the advantages of that approach. These advantages are outlined below.

(a) Advantages for the State

29. States have a clear interest in encouraging MSMEs to operate in the formal economy. One of the reasons often cited for that interest is in terms of taxation, since encouraging MSMEs to operate in the formal economy will broaden the tax base of the State.[8] It may also help reduce any friction that may exist with enterprises already operating in the formal economy and paying taxes, but that must compete for market share with informal businesses. Additional reasons for a State to take action to encourage businesses to operate in the formal economy may include, depending upon the specific economic sector, ensuring consumer protection and compliance with labour laws, and, in general, engendering trust in business and commerce in the State for stakeholders including consumers, business partners and banks.

30. Other advantages to the State may be less direct, but are no less valuable. For example, providing previously informal businesses with the means to enter the formal economy will permit those MSMEs to grow, create jobs, and increase their earnings and contribution to the creation of wealth and the reduction of poverty in the State. Businesses that operate in the formal economy can be expected to attract more qualified employees and to stay in business longer, thus making investment in the training of personnel and the acquisition of capital more profitable. The increase in the number of businesses that comply with mandatory registrations will mean that there is more and better economic data available, that more information will be

[7] The draft legislative guide on key principles of a business registry (A/CN.9/940) provides greater detail on the function of one-stop shops.

[8] States may wish to note that reduced taxation rates and administration may be an incentive offered to MSMEs to join the formal economy, and that too great an emphasis on expanding the tax base might be counterproductive.

exchanged in respect of such businesses and that information will become more transparent. All of these effects will have an overall positive impact on the economy of the State.

(b) Advantages for entrepreneurs

31. Entrepreneurs will also receive benefits from operating in the formal economy. The following factors are often cited as key advantages for MSMEs that operate in that commercial context.

(a) Visibility to the public and to markets

Registering a business with public authorities, including mandatory or non-mandatory registration in the business registry, can be a means through which the business becomes visible to the public and to markets, thus providing a means for exposure to potential clients and business contacts, and an expansion of market opportunities. This membership in the marketplace may provide opportunities to become a supplier of goods and services under favourable conditions, and can improve the profitability of the business. Moreover, such visibility both reduces costs and enables MSMEs to trade in economic circles beyond their relatives, friends and local contacts, thus opening up new markets.

(b) Visibility to the banking system and financial institutions

Registration with public authorities, including mandatory or non-mandatory business registration, can also provide an enterprise with improved access to banking and financial services, including to bank accounts, loans and credit. This permits MSMEs to move away from financial reliance on relatives and friends, making it easier for them to raise capital from a broader group of investors, as well as lowering the cost of that capital. This, in turn, permits businesses to expand, to make new investments, to diversify their risk, and to take up new business opportunities.

(c) Public procurement

In most States, public procurement contracts are only available to those businesses that are in compliance with mandatory registration requirements and are part of the formal economy. Access to such contracts may be enhanced for certain groups, since some States have developed specific programmes to ensure that a certain percentage of public procurement contracts are granted to less entitled entrepreneurs, including women, youth, the disabled and the elderly.

(d) Legal validation

Compliance with mandatory registration requirements permits a business to operate legally in the jurisdiction and provides the entrepreneur with documentation of that status. This status also enables businesses to have access to justice for commercial purposes, to enter into and enforce contracts more easily, and may facilitate access to exit mechanisms, such as reorganization or liquidation, in the event of financial difficulty. In some legal systems, compliance with all mandatory registrations provides additional legal rights for the entrepreneur operating in the commercial sector, including flexible provisions on commercial contracts, specialized commercial court divisions, a relaxation of certain requirements in forming a business entity, and similar benefits.

(e) Legal compliance

While related to the concept of legal validation, compliance with the law can itself be seen as an advantage, since it alleviates entrepreneurial anxiety in respect of operating informally, and makes it less likely that fines may be imposed. Being in compliance with the law will also reduce the business' vulnerability to corruption and bribery, and should assist the entrepreneur by providing recourse in cases of tax and other inspections.

(f) Access to flexible business forms and asset partitioning

Through registration, the entrepreneur will be entitled to choose the legal business form available in the jurisdiction that is best suited to his or her needs; ideally, the State will provide for a range of legal business forms for that purpose. Most jurisdictions have at least one business form that permits the entrepreneur to separate personal finances from business finances; such asset partitioning can be invaluable to a business, particularly if financial difficulty is encountered, as the entrepreneur is not in danger of losing all personal assets, and the value of the business assets can be maximized in the case of reorganization or liquidation. Moreover, the value of a business with separate assets may be greater and can be more readily transferred.

(g) Unique name and intangible assets

Compliance with mandatory registrations often requires an enterprise to operate under a sufficiently unique business name. This unique name translates into a market identity that can develop a value of its own and be traded to a subsequent owner. Other intangible assets that can add to the value of a business and be traded, particularly in the case of asset partitioning and a separate legal business identity, include client lists and commercial relationships.

(h) Opportunities for growth

In addition to the advantages of visibility set out above, compliance with mandatory registration requirements, including with the business registry, provides an enterprise with access to a much larger business network, which can permit it to grow the business and operate on a much greater scale. Some States permit a business that has fulfilled its legal requirements to become a member of a trade organization, which can greatly enhance an enterprise's opportunities for development.

(i) Opportunities for specialization of labour

Businesses that have complied with their mandatory registration requirements tend to be less constrained in their hiring practices and may be able to recruit employees outside of family and friends. This can facilitate access to a larger pool of talent and permit specialization among employees, enabling the MSME to make better use of employee talents and improving overall productivity.

(j) Access to government assistance programmes

Many States provide specific assistance programmes for MSMEs or for specific types of disadvantaged entrepreneurs. Operation in the formal economy will usually permit an enterprise to access all forms of government assistance available to such businesses.

(k) Empowerment and emancipation effects

The operation in the formal economy of businesses that are owned by women, youth, the disabled, the elderly and other less advantaged groups may have important empowerment and emancipation effects. This may be particularly so in respect of women entrepreneurs, many of whom are micro-entrepreneurs that are often exposed to greater risk as a result of corruption and abuse of authority.

(l) Longer term gains

The visibility of a business operating in the formal economy can also be the main conduit for its growth into cross-border trading. It is also possible that, in the longer term, and particularly through the use of electronic commerce and Internet facilities, robust compliance of businesses with mandatory registration requirements may lead to an increase in cross-border trading and foreign investment — advantages not only for the enterprise, but for the State as well.

2. Communication and education

32. Communication of, and education on, the advantages of legal and policy reforms undertaken by the State to assist MSMEs will be key to the success of those reforms. While this might seem a relatively small detail, in the context of States and regions in transition or with remote areas, all potential entrepreneurs may not be well-served by mass media or have dependable and regular access to telecommunications or the Internet. In such contexts, the potential obstacles to communication and education, and thus to the success of the reforms, can be expected to be more numerous.

33. An additional consideration for a State in developing communication and education strategies should be the literacy challenges faced by many micro-entrepreneurs and the particular steps that may need to be taken to overcome this hurdle.

34. In designing its communication and education plan, a State must be cognizant of the potential impediments outlined above and think practically about how best to overcome such difficulties. Possible solutions could include:

(a) Providing mobile education and communication efforts, and for mobile registration and facilitation counters, so as to enable travel to the entrepreneur's location;

(b) Using trade organizations or informal workers' associations to assist in publicizing the programmes;

(c) Using mass media that is broadly available, including radio, television and print media, as well as posters and billboards;

(d) Making blanket announcements via text on mobile phones; this may be particularly effective in areas where mobile payments are being used;

(e) Ensuring communication and education is in the local language;

(f) Making use of social media; while less practical in terms of States that face technological hurdles, social media may be an effective tool, particularly to disseminate information among younger entrepreneurs and family members;

(g) Developing courses for gender-specific trading or involving other disadvantaged groups; and

(h) Using educational techniques that may be particularly useful in the context.

B. Making it desirable for MSMEs to operate in the formal economy

35. Another component of the communication package that should be conveyed to prospective businesses is clear information on the incentives a State provides to MSMEs to encourage them to participate in the formal economy. It is important that businesses are made aware of such incentives and that they outweigh the perceived advantages of operating in the informal economy.

36. The effectiveness of the incentives offered by the State will vary according to the specific economic, business and regulatory context. While it is not possible to specify precisely which incentives should be offered, States may wish to consider the incentives outlined in the following paragraph, each of which, often in combination with others, has been found to be an effective means of encouraging MSMEs to enter the formal economy. In addition, in planning for the creation of these incentives, States may need to ensure coordination with international organizations which work with MSMEs (including, for example, the World Bank Group, UNCTAD, UNIDO, the Asian Development Bank, or OHADA), officials of public authorities with which businesses must register, local business incubators, the tax authority, and banks in order to maximize the impact of the incentives chosen.

37. A State may consider programmes along the following lines:

(a) Simplification of the registration process for businesses;

(b) Assistance with the registration process for businesses;

(c) Free (or at least very low-cost) registration;

(d) Receipt of an official certificate indicating the registered status and legal form of the business;

(e) Organized access to and support with banking services (bank accounts and chequing accounts);

(f) Easier access to credit for businesses operating in the formal economy;

(g) Accountancy training and services, and ensuring simplified accounting rules suitable for MSMEs;

(h) Assistance with the preparation of a business plan;

(i) Training (including managing inventory and finances);

(j) Tax and other credits for training costs;

(k) Protection against potential administrative abuse, possibly through access to mediation or other dispute resolution mechanisms;

(l) Simpler and more equitable taxation (lower, simplified taxation rates), including tax mediation services and simplified tax forms;

(m) Business counselling services;

(n) A transition period to give new businesses time to comply fully with applicable laws;

(o) A temporary "tax holiday" for small and microenterprises upon their initial registration with the necessary public authorities;

(p) Lump sum monetary compensation or government subsidies and programmes to foster MSME growth;

(q) Public communication and promotion of the business, as well as networking opportunities and access to experienced businesses, for example through free memberships in industry organizations;

(r) Specific public procurement programmes to encourage small and micro-businesses or those owned by disadvantaged groups to have access to contracts;

(s) Low-cost technological infrastructure;

(t) Access to and support with obtaining health insurance; and

(u) The establishment of a business mentoring programme with experienced business owners to facilitate access to experience and information for MSMEs.

C. Making it easy for MSMEs to operate in the formal economy

38. In addition to a lack of information, one of the most often-cited reasons given by MSMEs for their reluctance to operate in the formal economy is the cost and administrative burden of doing so. Two areas of reform that States may undertake to assuage these concerns are to simplify and streamline the procedures necessary for a business to comply with the mandatory registrations with public authorities, focusing on the needs of the user, and to provide flexible and simplified legal business forms for MSMEs.

1. Simplified and streamlined registration for businesses

39. One aspect of making it simple and desirable for an MSME to operate its business in the formal economy is to take a user-centric approach and to make the procedures for mandatory registrations with public authorities, including business registration, accessible, simple and clear. Improvements made by a State to its registration system may be expected to assist not only MSMEs, but also larger businesses, including those already operating in the formal economy. Importantly, care must also be taken to effectively communicate these changes and their advantages to MSMEs and potential entrepreneurs throughout the jurisdiction.

2. Flexible and simplified business forms for MSMEs

40. Another aspect of creating an enabling legal environment for MSMEs is for the State to permit them simple access to flexible, legally recognized business forms. Many micro and small businesses are either sole proprietorships or family enterprises that do not possess a legal identity or a business form distinct from that of the owner. An entrepreneur should be permitted to easily and inexpensively register a business with a legally recognized form in that jurisdiction. States may wish to permit registration of a range of different legal forms so as to provide entrepreneurs with sufficient flexibility to meet the needs of MSMEs, to allow them access to investment and venture capital, and to foster their growth.

41. In this respect, some States and regional economic organizations have created a legal business form for individual entrepreneurs (for example, for those whose business turnover is below a certain amount) which adds certain benefits to those otherwise available to the sole proprietor. These benefits tend to include being subject to a simplified scheme for the calculation and payment of taxes and social security contributions, as well as fast, simplified and low (or no) cost registration requirements and formalities. Nonetheless, such business forms typically do not change the unlimited personal liability of a sole proprietor, whose personal and professional assets are all available to meet any business debt.

42. States should also consider offering to MSMEs the opportunity for an enterprise to partition its business assets from the personal assets of its owner(s). The legal ability of an enterprise to partition its business assets from the personal assets of its owner(s) is an important building block for the encouragement of entrepreneurial activity since, even though a business may fail, the personal assets of the entrepreneur(s) will be protected.

43. Asset partitioning is seen as one of the defining features of a limited liability business entity, which is said to be among the most productivity enhancing legal institutions available. Models that provide limited liability may include stock companies, and many States have introduced simplified forms of stock companies that prioritize flexibility and contractual freedom, making them suitable for MSMEs. However, it should be noted that the benefits of asset partitioning for MSMEs registering their businesses may also be available in a legal structure that stops short of legal personality, while being subject to fewer formal requirements. Offering entrepreneurs the opportunity to take on legal personality and limited liability through the adoption of a simplified business form is a feature that States should consider in making policy decisions on legal forms to adopt in order to reduce the legal obstacles encountered by MSMEs.

44. One model that has been adopted permits an individual entrepreneur to officially allocate a certain share of personal assets to the entrepreneur's professional activity. This approach permits the entrepreneur to segregate professional assets from personal assets so that, in the event of financial difficulty of the business, creditors will have access only to the professional assets of the entrepreneur. In several States, the adoption of simplified corporate forms has enabled SMEs, in particular, to become more competitive with larger businesses by offering greater flexibility (as compared with the potentially burdensome and complex mandatory rules often required in more traditional incorporation regimes), limited liability of the partners in the business, and

relative ease and simplicity of formation and registration, including the typical absence of a minimum capital requirement. Simplified corporate forms usually provide default provisions to fill any gaps that might exist in the rules established by the founders of the enterprise. These default rules can be particularly important for smaller or less-experienced business persons.

45. Another model that has been used in this regard is the establishment of a separate capital fund that has been established for a specific purpose. Such a fund may be established by individuals (and their spouses), into which specific assets can be placed that are identified as necessary for the family requirements of the individuals. Such assets are then protected from seizure in the case of business insolvency. A variation on this model may also be created by a corporation, which can establish a separate capital fund devoted to a specific purpose or which can agree that the earnings of an activity be dedicated to the repayment of loans obtained for the execution of certain specified activities. The establishment of such a fund is subject to certain requirements, including that its existence be made public by way of the business registry, and that it be open to opposition by existing creditors of the corporation. Once the fund is constituted, it is segregated from the other funds of the company, and may only be used to satisfy the claims of creditors arising as a result of the relevant activities. Other variations on the creation of a segregated fund may include the declaration of the fund to a specific purpose to the benefit of a natural or legal person, a public administrative body, or other entity, provided that the fund is established by public deed and is registered.

46. An additional example of asset partitioning that stops short of providing legal personality is the concept of "business network contracts". This legal tool can be used by a group of entrepreneurs (of various types and sizes, including sole proprietors, companies, public entities, and non-commercial and not-for-profit entities) who undertake a joint venture as agreed in the business network contract, which may be in respect of certain services or common activities within the scope of their business, or even with respect to the exchange of information. The goal of such an approach is to strengthen the individual businesses involved in the contract, as well as the network itself, at the national and international levels, so as to enable access to business opportunities not available to an individual enterprise, and thus to improve competitiveness. The contract must meet the formal requirements established by the State (for example, be duly executed in writing, indicate the objectives of the venture, its duration, the rights and obligations of participants, etc.), and be registered with the business registry. In addition, the contract must establish a capital fund to carry out the programme of the business network; this fund is then segregated from the individual assets of the founding entrepreneurs, and is available only to satisfy claims deriving from the activities performed within the scope of the network, and not for creditors of the individual entrepreneurs that created the business network.

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Settlement of commercial disputes

International commercial mediation: draft convention on international settlement agreements resulting from mediation

Note by the Secretariat

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I. Introduction

1. At its forty-seventh session, in 2014, the Commission considered a proposal to undertake work on the preparation of a convention on the enforceability of settlement agreements reached through international commercial conciliation (A/CN.9/822).[1] It requested the Working Group to consider the feasibility and possible form of work in that area.[2] At its forty-eighth session, in 2015, the Commission took note of the consideration of the topic by the Working Group[3] and agreed that the Working Group should commence work at its sixty-third session to identify relevant issues and develop possible solutions. The Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.[4] At its forty-ninth session, in 2016, the Commission confirmed that the Working Group should continue its work on the topic.[5] At its fiftieth session, in 2017, the Commission took note of the compromise reached by the Working Group at its sixty-sixth session, which addressed five key issues as a package (referred to as the "compromise proposal", see A/CN.9/901, para. 52) and expressed support for the Working Group to continue its work based on the compromise proposal.[6]

2. At its sixty-third to sixty-eighth sessions, the Working Group undertook work on the preparation of instruments on enforcement of international settlement agreements resulting from mediation, consisting of a draft convention and draft amendments to the UNCITRAL Model Law on International Commercial Conciliation (the "Model Law").[7] For ease of reference, this note refers to the "draft convention" and "draft amended Model Law"; jointly, they are referred to as the "draft instruments".

3. In accordance with the request of the Working Group at its sixty-eighth session, this note contains the draft convention with annotations, based on the deliberations and decisions of the Working Group (A/CN.9/934, para. 13). The text of the draft amended Model Law with annotations is contained in document A/CN.9/943.

II. Draft convention on international settlement agreements resulting from mediation

A. Text of the draft convention

4. The text of the draft convention reads as follows.

"United Nations Convention on International Settlement Agreements Resulting from Mediation

"Preamble

"*The Parties to this Convention,*

"*Recognizing* the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

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[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 123–125.

[2] Ibid., para. 129.

[3] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 135–141; see also A/CN.9/832, paras. 13–59.

[4] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 142.

[5] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162–165.

[6] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 236–239.

[7] The reports of the Working Group on the work of its sixty-third to sixty-eighth sessions are contained in documents A/CN.9/861, A/CN.9/867, A/CN.9/896, A/CN.9/901, A/CN.9/929 and A/CN.9/934, respectively.

"*Noting* that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

"*Considering* that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

"*Convinced* that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

"*Have agreed* as follows:

"Article 1. Scope of application

"1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ('settlement agreement') which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

"2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

"3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

"Article 2. Definitions

"1. For the purposes of article 1, paragraph 1:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

"2. A settlement agreement is 'in writing' if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so

as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

"3. 'Mediation' means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the mediator') lacking the authority to impose a solution upon the parties to the dispute.

"4. 'Seeking relief' means a party to a settlement agreement requesting enforcement of a settlement agreement under article 3, paragraph 1, or invoking a settlement agreement under article 3, paragraph 2. Similarly, 'granting relief' means a competent authority enforcing a settlement agreement under article 3, paragraph 1, or allowing a party to invoke a settlement agreement under article 3, paragraph 2.

"Article 3. General principles

"1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

"2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

"Article 4. Requirements for reliance on settlement agreements

"1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

"2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

"3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

"4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

"5. When considering the request for relief, the competent authority shall act expeditiously.

"Article 5. Grounds for refusing to grant relief

"1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

"2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

"Article 6. Parallel applications or claims

"If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper,

adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

"Article 7. Other laws or treaties

"This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

"Article 8. Reservations

"1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

"2. No reservations are permitted except those expressly authorized in this article.

"3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

"4. Reservations and their confirmations shall be deposited with the depositary.

"5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

"Article 9. Effect on settlement agreements

"The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

"Article 10. Depositary

"The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

"Article 11. Signature, ratification, acceptance, approval, accession

"1. This Convention is open for signature by all States in [...] on [...], and thereafter at United Nations Headquarters in New York.

"2. This Convention is subject to ratification, acceptance or approval by the signatories.

"3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

"4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

"Article 12. Participation by regional economic integration organizations

"1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

"2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

"3. Any reference to a 'Party to the Convention', 'Parties to the Convention', a 'State' or 'States' in this Convention applies equally to a regional economic integration organization where the context so requires.

"4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1(1) are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization.

"Article 13. Non-unified legal systems

"1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

"2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

"3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention,

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

"4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

"**Article 14. Entry into force**

"1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval, or accession.

"2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

"**Article 15. Amendment**

"1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

"2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

"3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

"4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

"5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

"**Article 16. Denunciations**

"1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

"2. The denunciation shall take effect twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

"DONE at ---- this [X] day of [X] ------, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic."

B. Annotations

1. Terminology

5. The Commission may wish to note the decision of the Working Group to replace the term "conciliation" by "mediation" throughout the draft instruments. The Working Group further approved the explanatory text describing the rationale for that change (A/CN.9/934, para. 16), which would be used with necessary adjustments when revising existing UNCITRAL texts on conciliation (for consideration of the matter at previous sessions of the Working Group, see A/CN.9/929, paras. 102–104; and A/CN.9/867, para. 120). The explanatory text reads as follows:

> "'*Mediation' is a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of, or relating to, a contractual or other legal relationship. In its previously adopted texts and relevant documents, UNCITRAL used the term 'conciliation' with the understanding that the terms 'conciliation' and 'mediation' were interchangeable. In preparing the Convention on International Settlement Agreements Resulting from Mediation and the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), the Commission decided to use the term 'mediation' instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the instruments. This change in terminology does not have any substantive or conceptual implications.*"

2. Title and preamble

6. The Working Group tentatively approved the title of the draft convention (A/CN.9/934, para. 143) as well as the preamble (A/CN.9/934, para. 145). The Commission may wish to note the adjustments made to the preamble resulting from the decision of the Working Group to use the word "mediation" instead of the generic phrase "dispute settlement methods".

3. Reference to "Party/Parties to the Convention"

7. The draft convention tentatively uses the terms "a Party to the Convention" or "Parties to the Convention", instead of referring to "Contracting State(s)" for the reason that the term "Contracting State(s)" is referred to in article 2(1)(f) of the Vienna Convention on the Law of Treaties to mean a State which consents to be bound by the treaty, whether or not the treaty has entered into force (A/CN.9/934, paras. 116–118). The Commission may wish to note that the term "Contracting States" has been used in existing conventions in the field of international trade law, with the purpose of avoiding confusions between the Parties to the convention and the parties to the contractual relation covered by the convention.[8] The Commission may wish to consider the term that should be used under this draft convention.

4. Remarks on article 1 — Scope of application

8. Paragraph 1 introduces the generic term "settlement agreement" (A/CN.9/896, para. 146). The Commission may wish to note that reference to "international

[8] See, for instance, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), United Nations Convention on the Limitation Period in the International Sale of Goods (1974), United Nations Convention on Contracts for the International Sale of Goods (CISG, 1980), United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995), United Nations Convention on the Assignment of Receivables in International Trade (2001), United Nations Convention on the Use of Electronic Communications in International Contracts (2005), United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules, 2008), HCCH Convention on Choice of Court Agreements, 2005.

agreements" has been avoided in paragraph 1 as that expression often refers to agreements between States or other international legal persons binding under international law (A/CN.9/934, para. 17). Therefore, paragraph 1 reflects the modification agreed by the Working Group in that respect.

For approval of article 1(1) at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 18 and 21; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 14 and 30; A/CN.9/901, paras. 52 and 56; A/CN.9/896, paras. 14–16, 113–117, 145 and 146; and A/CN.9/867, para. 94; for consideration of the notion of internationality, see A/CN.9/929, paras. 31–35 and 43; A/CN.9/896, paras. 17–24 and 158–163; A/CN.9/867, paras. 93–98; and A/CN.9/861, paras. 33–39.

- *Exclusions: personal, family, inheritance, employment matters — settlement agreement enforceable as a judgment or as an arbitral award*

9. Paragraphs 2 and 3 address exclusions from the scope of the draft convention. The Commission may wish to note that paragraph 3 aims at avoiding possible overlap with existing and future conventions, namely the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), the Convention on Choice of Court Agreements (2005) and the 2016 preliminary draft convention on judgments, under preparation by the Hague Conference on Private International Law (A/CN.9/896, para. 49).

For approval of article 1(2) at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 23; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 15 and 30; A/CN.9/896, paras. 55–60; A/CN.9/867, paras. 106–108; and A/CN.9/861, paras. 41–43.

For approval of article 1(3) at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 24; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 17–29 and 30; A/CN.9/901, paras. 25–34, 52, and 58–71; A/CN.9/896, paras. 48–54, 169–176 and 205–216; A/CN.9/867, paras. 118 and 125–131; and A/CN.9/861, paras. 24–28.

5. Remarks on article 2 — Definitions

10. Paragraphs 1 to 3 of article 2 (previously numbered art. 3, see A/CN.9/934, para. 139(ii)) contain definitions approved in substance by the Working Group.

11. The Commission may wish to consider whether the definition of the terms "electronic communication" and "data message" could be deleted from paragraph 2. The purpose of the draft convention is not to address these matters in detail and definitions are contained in other United Nations and UNCITRAL instruments, which could be used as a reference in the context of the draft convention. Further, the definition of these terms may not fully reflect technological developments in this field over time, and amending the convention to reflect such developments might not be practicable.

12. As a matter of drafting, the Commission may wish to note that the words "regardless of the expression used and irrespective of the basis upon which the process is carried out" in paragraph 3 have been replaced by the words "irrespective of the expression used or the basis upon which the process is carried out".

13. The Commission may wish to consider paragraph 4, which aims at clarifying the notions of "granting relief" and "seeking relief". As these expressions may have a generic connotation, in particular when translated in different official languages of the United Nations, it is suggested to clarify that the expressions refer to possible actions under the draft convention as defined under article 3 (A/CN.9/934, para. 138).

For approval of the definitions under article 2, paragraphs 1 to 3, see:

- Regarding paragraph 1, at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 26 and 28; for consideration of the matter at previous

sessions, see A/CN.9/929, paras. 31–35 and 43; A/CN.9/896, paras. 17–24 and 158–163; A/CN.9/867, para. 101; and A/CN.9/861, paras. 33–39

- Regarding paragraph 2, at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 29; for consideration of the matter at previous sessions, see A/CN.9/929, para. 43; A/CN.9/896, paras. 32–38 and 66; and A/CN.9/867, para. 133
- Regarding paragraph 3, at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 30–32; for consideration of the matter at previous sessions, see A/CN.9/929, para. 43; A/CN.9/896, paras. 39–47; A/CN.9/867, para. 121; and A/CN.9/861, para. 21.

6. Remarks on article 3 — General principles

14. Article 3 (previously numbered art. 2, see A/CN.9/934, para. 139(ii)) provides for States' obligations under the draft convention regarding both enforcement of settlement agreements (para. 1) and the right for a party to invoke a settlement agreement as a defence against a claim (para. 2).

For approval of article 3 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 25; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 44–48 and 73; A/CN.9/901, paras. 16–24, 52, 54 and 55; A/CN.9/896, paras. 76–81, 152, 153, 155 and 200–203; A/CN.9/867, para. 146; and A/CN.9/861, paras. 71–79).

7. Remarks on article 4 — Requirements for reliance on settlement agreements

15. The Commission may wish to note that article 4 reflects a balance between, on the one hand, the formalities that are required to ascertain that a settlement agreement result from mediation and, on the other, the need for the draft convention to preserve the flexible nature of the mediation process (A/CN.9/867, para. 144).

16. As matters of drafting, the Commission may wish (i) to consider whether the words "such as" which appear at the end of the chapeau of paragraph 1(b) could be replaced by the words "in the form of"; and (ii) to note that, for the sake of simplification and consistency between paragraphs 3 and 4, the words "the party requesting relief to supply" which appeared after the words "may request" in paragraph 3 have been deleted.

For approval of article 4 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 37–39; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 49–67 and 73; see A/CN.9/896, paras. 67–75, 82 and 177–190; A/CN.9/867, paras. 133–144; and A/CN.9/861, paras. 51–67.

8. Remarks on article 5 — Grounds for refusing to grant relief

17. The Commission may wish to note the extensive consultations of the Working Group at its sixty-eighth session aimed at clarifying the various grounds provided for in paragraph 1, in particular the relationship between subparagraph (b)(i), which mirrored a similar provision of the New York Convention and was considered to be of a generic nature, and subparagraphs (b)(ii), (b)(iii), (c) and (d), which were deemed to be illustrative in nature. At that session, it was noted that various attempts for regrouping the grounds had been unsuccessful. It was further noted that such attempts represented serious efforts at avoiding overlap in light of the importance of the issue. However, difficulties arose because of the need to accommodate the concerns of different domestic legal systems, which resulted in the failure of such attempts to gain consensus. Therefore, the Working Group expressed a shared understanding that there might be overlap among the grounds provided for in paragraph 1 and that competent authorities should take that aspect into account when interpreting the various grounds (A/CN.9/934, paras. 60–65).

For approval of article 5 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 59 and 66; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 74–101; A/CN.9/901, paras. 41–50, 52 and 72–88; A/CN.9/896, paras. 84–117 and 191–194; A/CN.9/867, paras. 147–167; and A/CN.9/861, paras. 85–102.

9. Remarks on article 6 — Parallel applications or claims

18. Article 6 provides the competent authority with the discretion to adjourn its decision if an application or claim relating to a settlement agreement had been made to a court, arbitral tribunal or other competent authority, which might affect the process (A/CN.9/896, para. 123). It is based on article VI of the New York Convention, which addresses the situation where a party seeks to set aside an arbitral award at the place of arbitration while the other party seeks to enforce it elsewhere. The Working Group agreed that article 6 should apply to both when enforcement of a settlement agreement was sought and when a settlement agreement was invoked as a defence (A/CN.9/934, para. 69).

For approval of article 6 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 70; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 122–125; A/CN.9/867, paras. 168 and 169; and A/CN.9/861, paras. 103–107.

10. Remarks on article 7 — Other laws or treaties

19. Article 7, which mirrors article VII of the New York Convention would permit application of more favourable national legislation or treaties to matters covered by the draft convention. The understanding of the Working Group was that article 7 would not allow States to apply the draft convention to settlement agreements excluded in article 1, paragraphs 2 and 3, as such settlement agreements would fall outside the scope of the draft convention. However, States would have the flexibility to enact relevant domestic legislation, which could include in its scope such settlement agreements (A/CN.9/929, para. 19).

For approval of article 7 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 71; for consideration of the matter at previous sessions, see A/CN.9/929, para. 19; A/CN.9/901, paras. 65, 66 and 71; and A/CN.9/896, paras. 154, 156, and 204.

11. Remarks on the final provisions

(i) Article 8 — Reservations

20. Article 8 provides for two reservations authorized under the draft convention. Regarding the first reservation on settlement agreements involving States and other public entities, the Working Group agreed that such agreements should not be excluded from the scope. Rather, it was agreed that the treatment of such agreements could be addressed through a reservation in the draft convention. Regarding the second reservation on the application of the draft convention based on the parties' consent, the Working Group agreed that that question need not be addressed in the draft convention, but should be left to States when adopting or implementing the convention.

For approval of article 8(1)(a) at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 77 and 93; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 61 and 62; and A/CN.9/861, paras. 44–46.

For approval of article 8(1)(b) at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 79 and 93; for consideration of the matter at previous sessions, see A/CN.9/901, paras. 39 and 40; and A/CN.9/896, paras. 130 and 196.

For approval of article 8, paragraphs (2) to (5) at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 81–93.

(ii) Article 9 — Effect on settlement agreements

21. Article 9 addresses the impact of the entry into force of the draft convention and of any reservations or withdrawal thereof on settlement agreements concluded before such entry into force (A/CN.9/934, para. 90). Similarly, article 16(2) addresses the effect of the denunciation of the draft convention on settlement agreements concluded before such denunciation takes effect. The purpose of the provisions is to enhance legal certainty for parties to settlement agreements.

(iii) Articles 10 to 16

22. At its sixty-eighth session, the Working Group approved in substance articles 10 to 16 (A/CN.9/934, paras. 94–115).

23. The Commission may wish to note that, as indicated in para. 94 of document A/CN.9/934, the delegation of Singapore expressed an interest in hosting a ceremony for the signing of the convention, once adopted. That proposal was welcomed and supported by the Working Group. The Commission may wish to consider this offer in relation to its consideration of article 11(1).

12. Other matters

(i) General Assembly resolution

24. The Commission may wish to note that the Working Group prepared both a draft convention and a draft amended Model Law in a spirit of compromise and to accommodate the different levels of experience with mediation in different jurisdictions. The Working Group agreed that a possible approach to address the specific circumstance of preparing both a convention and a model legislative text could be to suggest that the resolutions of the General Assembly accompanying those instruments would express no preference on the instrument to be adopted by States (A/CN.9/901, para. 93).

25. In that context, the Working Group agreed on the following wording for consideration by the Commission, and eventually recommendation to the General Assembly for inclusion in the relevant resolution: "*Recalling that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the UNCITRAL Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions, and to provide States with consistent standards on cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument.*"

For consideration by the Working Group of the form of the instruments, see A/CN.9/901, paras. 52 and 89–93; and A/CN.9/896, paras. 135–143 and 211–213;

For approval of the draft text in para. 25 above at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 140–142.

(ii) Material accompanying the draft convention

26. The Commission may wish to note the recommendation by the Working Group that, resources permitting, the *travaux preparatoires* of the draft convention should be compiled by the Secretariat, so that they could be easily accessible and user-friendly (A/CN.9/934, paras. 146–148).

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Settlement of commercial disputes

International commercial mediation: draft model law on international commercial mediation and international settlement agreements resulting from mediation

Note by the Secretariat

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I. Introduction

1. At its forty-seventh session, in 2014, the Commission considered a proposal to undertake work on the preparation of a convention on the enforceability of settlement agreements reached through international commercial conciliation (A/CN.9/822).[1] It requested the Working Group to consider the feasibility and possible form of work in that area.[2] At its forty-eighth session, in 2015, the Commission took note of the consideration of the topic by the Working Group[3] and agreed that the Working Group should commence work at its sixty-third session to identify relevant issues and develop possible solutions. The Commission also agreed that the mandate of the Working Group with respect to that topic should be broad to take into account the various approaches and concerns.[4] At its forty-ninth session, in 2016, the Commission confirmed that the Working Group should continue its work on the topic.[5] At its fiftieth session, in 2017, the Commission took note of the compromise reached by the Working Group at its sixty-sixth session, which addressed five key issues as a package (referred to as the "compromise proposal", see A/CN.9/901, para. 52) and expressed support for the Working Group to continue its work based on the compromise proposal.[6]

2. At its sixty-third to sixty-eighth sessions, the Working Group undertook work on the preparation of instruments on enforcement of international settlement agreements resulting from mediation, consisting of a draft convention and draft amendments to the UNCITRAL Model Law on International Commercial Conciliation (the "Model Law").[7] For ease of reference, this note refers to the "draft convention" and "draft amended Model Law"; jointly, they are referred to as the "draft instruments".

3. In accordance with the request of the Working Group at its sixty-eighth session, this note contains the draft amended Model Law, with annotations, based on the deliberations and decisions of the Working Group (A/CN.9/934, para. 13). The text of the draft convention with annotations is contained in document A/CN.9/942.

II. Draft model law on international commercial mediation and international settlement agreements resulting from mediation

A. Text of the draft amended Model Law

4. The text of the draft amended Model Law reads as follows.

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 123–125.

[2] Ibid., para. 129.

[3] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 135–141; see also A/CN.9/832, paras. 13–59.

[4] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 142.

[5] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162–165.

[6] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), paras. 236–239.

[7] The reports of the Working Group on the work of its sixty-third to sixty-eighth sessions are contained in documents A/CN.9/861, A/CN.9/867, A/CN.9/896, A/CN.9/901, A/CN.9/929 and A/CN.9/934, respectively.

UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)

"Section 1 — General provisions

"Article 1. Scope of application of the Law and definitions

"1. This Law applies to international commercial[1] mediation[2] and to international settlement agreements.

"2. For the purposes of this Law, 'mediator' means a sole mediator or two or more mediators, as the case may be.

"3. For the purposes of this Law, 'mediation' means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ('the mediator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.

"Article 2. Interpretation

"1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

"2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

"Section 2 — Mediation

"Article 3. Scope of application of the section and definitions

"1. This section applies to international[3] commercial mediation.

"2. A mediation is 'international' if:

(a) The parties to an agreement to mediate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

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[1] The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

[2] In its previously adopted texts and relevant documents, UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. In preparing this Model Law, the Commission decided to use the term "mediation" instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications.

[3] States wishing to enact this section to apply to domestic as well as international mediation may wish to consider the following changes to the text:

- Delete the word "international" in paragraph 1 of articles 1 and 3; and
- Delete paragraphs 2, 3 and 4 of article 3, and modify references to paragraphs accordingly.

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected.

"3. For the purposes of paragraph (2):

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to mediate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

"4. This section also applies to commercial mediation when the parties agree that the mediation is international or agree to the applicability of this section.

"5. The parties are free to agree to exclude the applicability of this section.

"6. Subject to the provisions of paragraph 7 of this article, this section applies irrespective of the basis upon which the mediation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

"7. This section does not apply to:

(a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and

(b) [...].

"Article 4. Variation by agreement

"Except for the provisions of article 7, paragraph 3, the parties may agree to exclude or vary any of the provisions of this section.

"Article 5. Commencement of mediation proceedings[4]

"1. Mediation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in mediation proceedings.

"2. If a party that invited another party to mediate does not receive an acceptance of the invitation within thirty days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to mediate.

"Article 6. Number and appointment of mediators

"1. There shall be one mediator, unless the parties agree that there shall be two or more mediators.

"2. The parties shall endeavour to reach agreement on a mediator or mediators, unless a different procedure for their appointment has been agreed upon.

"3. Parties may seek the assistance of an institution or person in connection with the appointment of mediators. In particular:

[4] The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:

Article X. Suspension of limitation period

1. When the mediation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the mediation is suspended.

2. Where the mediation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement.

(a) A party may request such an institution or person to recommend suitable persons to act as mediator; or

(b) The parties may agree that the appointment of one or more mediators be made directly by such an institution or person.

"4. In recommending or appointing individuals to act as mediator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial mediator and, where appropriate, shall take into account the advisability of appointing a mediator of a nationality other than the nationalities of the parties.

"5. When a person is approached in connection with his or her possible appointment as mediator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A mediator, from the time of his or her appointment and throughout the mediation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

"Article 7. Conduct of mediation

"1. The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

"2. Failing agreement on the manner in which the mediation is to be conducted, the mediator may conduct the mediation proceedings in such a manner as the mediator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

"3. In any case, in conducting the proceedings, the mediator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

"4. The mediator may, at any stage of the mediation proceedings, make proposals for a settlement of the dispute.

"Article 8. Communication between mediator and parties

"The mediator may meet or communicate with the parties together or with each of them separately.

"Article 9. Disclosure of information

"When the mediator receives information concerning the dispute from a party, the mediator may disclose the substance of that information to any other party to the mediation. However, when a party gives any information to the mediator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the mediation.

"Article 10. Confidentiality

"Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

"Article 11. Admissibility of evidence in other proceedings

"1. A party to the mediation proceedings, the mediator and any third person, including those involved in the administration of the mediation proceedings, shall not in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings;

(b) Views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the mediation proceedings;

(d) Proposals made by the mediator;

(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator;

(f) A document prepared solely for purposes of the mediation proceedings.

"2. Paragraph 1 of this article applies irrespective of the form of the information or evidence referred to therein.

"3. The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

"4. The provisions of paragraphs 1, 2 and 3 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the mediation proceedings.

"5. Subject to the limitations of paragraph 1 of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a mediation.

"Article 12. Termination of mediation proceedings

"The mediation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;

(b) By a declaration of the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified, on the date of the declaration;

(c) By a declaration of the parties addressed to the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration; or

(d) By a declaration of a party to the other party or parties and the mediator, if appointed, to the effect that the mediation proceedings are terminated, on the date of the declaration.

"Article 13. Mediator acting as arbitrator

"Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator in respect of a dispute that was or is the subject of the mediation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

"Article 14. Resort to arbitral or judicial proceedings

"Where the parties have agreed to mediate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to

be regarded as a waiver of the agreement to mediate or as a termination of the mediation proceedings.

"Article 15. Binding and enforceable nature of settlement agreements

"If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable.

"Section 3 — International settlement agreements[5]

"Article 16. Scope of application of the section and definitions

"1. This section applies to international agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute ('settlement agreements').

"2. This section does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

"3. This section does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

"4. A settlement agreement is 'international' if, at the time of the conclusion of the settlement agreement:[6]

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

"5. For the purposes of paragraph 4:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

"6. A settlement agreement is 'in writing' if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic

[5] A State may consider enacting this section to apply to agreements settling a dispute, irrespective of whether they resulted from mediation. Adjustments would then have to be made to relevant articles. Further, a State may consider enacting this section to apply only where the parties to the settlement agreement agreed to its application.

[6] A State may consider broadening the definition of "international" settlement agreement by adding the following subparagraph to paragraph 4: "A settlement agreement is 'international' if it results from international mediation as defined in article 3, paragraphs 2, 3 and 4."

communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

"7. 'Seeking relief' means a party to a settlement agreement requesting enforcement of a settlement agreement under article 17, paragraph 1 or invoking a settlement agreement under article 17, paragraph 2. Similarly, 'granting relief' means a competent authority enforcing a settlement agreement under article 17, paragraph 1 or allowing a party to invoke a settlement agreement under article 17, paragraph 2.

"Article 17. General Principles

"1. A settlement agreement shall be enforced in accordance with the rules of procedure of this State, and under the conditions laid down in this section.

"2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State, and under the conditions laid down in this section, in order to prove that the matter has already been resolved.

"Article 18. Requirements for reliance on settlement agreements

"1. A party relying on a settlement agreement under this section shall supply to the competent authority of this State:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

"2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

"3. If the settlement agreement is not in an official language of this State, the competent authority may request a translation thereof into such language.

"4. The competent authority may require any necessary document in order to verify that the requirements of this section have been complied with.

"5. When considering the request for relief, the competent authority shall act expeditiously.

"Article 19. Grounds for refusing to grant relief

"1. The competent authority of this State may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

"2. The competent authority of this State may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of this State; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of this State.

"Article 20. Parallel applications or claims

"If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 18, the competent authority of this State where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security."

B. Annotations

1. Title, sections and terminology

5. The Commission may wish to note that the Working Group tentatively approved the title of the draft amended Model Law (A/CN.9/934, para. 144; see also A/CN.9/929, para. 106) as well as its structure and presentation in three different sections (A/CN.9/934, para. 119; see also A/CN.9/929, para. 105 and annex). The Working Group also approved the replacement of the term "conciliation" by "mediation" throughout the draft instruments, as well as the explanatory text describing the rationale for that change reproduced in footnote 2 to the draft amended Model Law (A/CN.9/934, para. 16; for consideration of the matter at previous sessions of the Working Group, see A/CN.9/929, paras. 102–104; and A/CN.9/867, para. 120; see also below, para. 19).

6. The Commission may wish to note that in its deliberations of the draft amended Model Law, the Working Group generally agreed that the guiding principles would be to ensure a level of consistency with the draft convention and, at the same time, to preserve the existing text of the Model Law to the extent possible (A/CN.9/934, para. 119).

2. Remarks on section 1 — General provisions

7. Section 1 of the draft amended Model Law applies to sections 2 and 3. This is reflected in article 1, paragraph 1, which provides that the law apply to both international commercial mediation and international settlement agreements. The Commission may wish to note that, in line with the decision of the Working Group, paragraphs 4 to 9 of article 1 of the Model Law have been moved to section 2 of the draft amended Model Law (see below, paras. 9 and 10).

8. Article 1, paragraphs 2 and 3 and article 2 are in substance unchanged from the Model Law.

For approval of article 1(1) at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 120; for consideration of the matter at previous sessions, see A/CN.9/929, para. 106;

For approval of article 1(3) at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 30–32; for consideration of the matter at previous sessions, see A/CN.9/929, para. 43; A/CN.9/896, paras. 39–47; A/CN.9/867, para. 121; and A/CN.9/861, para. 21.

3. Remarks on section 2 — Mediation

9. Section 2 addresses the mediation process, and includes the following provisions of the Model Law: article 1, paragraphs 1 and 4 to 9, and articles 3 to 14.

10. The Commission may wish to note the following adjustments:

- Footnote 1 of the Model Law which provides guidance to States wishing to enact the Model Law to apply to domestic and international mediation has been moved to section 2 of the draft amended Model Law (article 3(1)); this has been done in light of the disconnection between the definitions of the internationality of mediation and internationality of settlement agreements;
- Article 4 on variation by agreement refers to article 7(3) of the draft amended Model Law (numbered article 6(3) in the Model Law); the reference in article 4 to article 2 has been deleted as article 4 is placed in section 2, and applies only to provisions in that section;
- The title of article 15 of the draft amended Model Law (corresponding to article 14 of the Model Law) has been amended to read: "Binding and enforceable nature of settlement agreements" (A/CN.9/934, para. 132).

For approval of article 3(1) at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 120;

For approval of the placement of article 1, paragraphs 4 to 9 of the Model Law under article 3, paragraphs 2 to 7 of the draft amended Model Law at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 128–130; for consideration of the matter at previous sessions, see A/CN.9/929, para. 106.

4. Remarks on section 3 — International settlement agreements

11. Articles 16 to 20 address international settlement agreements in a manner consistent with the draft convention. The title of section 3 has been adjusted as agreed by the Working Group (A/CN.9/934, para. 139(iii)).

(i) Remarks on article 16 — Scope of application of the section and definitions

12. Paragraphs 1 to 6 have been approved in substance by the Working Group. Paragraph 1 introduces the generic term "settlement agreement". Paragraphs 2 to 6 are consistent with the corresponding provisions in articles 1 and 2 of the draft convention.

13. The Commission may wish to consider paragraph 7, which aims at clarifying the notions of "granting relief" and "seeking relief". As these expressions may have a generic connotation, in particular when translated in different official languages of the United Nations, it is suggested to clarify that the expressions refer to possible actions referred to under article 17 (A/CN.9/934, para. 138).

For approval of the scope of application and definitions under article 16, paragraphs 1 to 6, see:

- For approval of paragraph 1 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 120; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 14 and 30; A/CN.9/901, paras. 52 and 56; A/CN.9/896, paras. 14–16, 113–117, 145 and 146; and A/CN.9/867, para. 94;
- For approval of paragraph 2 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 23; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 15 and 30; A/CN.9/896, paras. 55–60; A/CN.9/867, paras. 106–108; and A/CN.9/861, paras. 41–43;
- For approval of paragraph 3 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 24; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 17–29 and 30; A/CN.9/901, paras. 25–34, 52, and 58–71; A/CN.9/896, paras. 48–54, 169–176 and 205–210; A/CN.9/867, paras. 118 and 125–131; and A/CN.9/861, paras. 24–28;
- For approval of paragraphs 4 and 5 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 28 and 121–127; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 31–35, 39 and 43; A/CN.9/896, paras. 17–24 and 158–163; A/CN.9/867, paras. 93–98 and 101; and A/CN.9/861, paras. 33–39;
- For approval of paragraph 6 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 29; for consideration of the matter at previous sessions, see A/CN.9/929, para. 43; A/CN.9/896, paras. 32–38 and 66; and A/CN.9/867, para. 133.

(ii) Remarks on article 17 — General principles

14. Article 17 provides for the principles regarding both enforcement of settlement agreements (paragraph 1) and the right for a party to invoke a settlement agreement as a defence against a claim (paragraph 2).

For approval of article 17 at the sixty-eighth session of the Working Group, see A/CN.9/934, para. 25; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 44–48 and 73; A/CN.9/901, paras. 16–24, 52, 54 and 55; A/CN.9/896, paras. 76–81, 152, 153, 155 and 200–203; A/CN.9/867, para. 146; and A/CN.9/861, paras. 71–79.

(iii) Remarks on article 18 — Requirements for reliance on settlement agreements

15. The Commission may wish to note that article 18 reflects a balance between, on the one hand, the formalities that would be required to ascertain that the settlement agreement resulted from mediation and, on the other, the need for the instrument to preserve the flexible nature of the mediation process (A/CN.9/867, para. 144).

16. As matters of drafting, the Commission may wish (i) to consider whether the words "such as" which appear at the end of the chapeau of paragraph 1(b) could be replaced by the words "in the form of"; and (ii) to note that, for the sake of

simplification and consistency between paragraphs 3 and 4, the words "the party requesting relief to supply" which appeared after the words "may request" in paragraph 3 have been deleted.

For approval of article 18 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 37–39; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 49–67 and 73; A/CN.9/896, paras. 67–75, 82, and 177–190; A/CN.9/867, paras. 133–144; and A/CN.9/861, paras. 51–67.

(iv) Remarks on article 19 — Grounds for refusing to grant relief

17. The Commission may wish to note the extensive consultations of the Working Group at its sixty-eighth session aimed at clarifying the various grounds provided for in paragraph 1, in particular the relationship between subparagraph (b)(i), which mirrored a similar provision of the New York Convention and was considered to be of a generic nature, and subparagraphs (b)(ii), (b)(iii), (c) and (d), which were deemed to be illustrative in nature. At that session, it was noted that various attempts for regrouping the grounds had been unsuccessful. It was further noted that such attempts represented serious efforts at avoiding overlap in light of the importance of the issue. However, difficulties arose because of the need to accommodate the concerns of different domestic legal systems, which resulted in the failure of such attempts to gain consensus. Therefore, the Working Group expressed a shared understanding that there might be overlap among the grounds provided for in paragraph 1 and that competent authorities should take that aspect into account when interpreting the various grounds (A/CN.9/934, paras. 60–65).

For approval of article 5 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 59 and 66; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 74–101; A/CN.9/901, paras. 41–50, 52 and 72–88; A/CN.9/896, paras. 84–117 and 191–194; A/CN.9/867, paras. 147–167; and A/CN.9/861, paras. 85–102.

(v) Remarks on article 20 — Parallel applications or claims

18. Article 6 provides the competent authority with the discretion to adjourn its decision if an application or claim relating to the settlement agreement had been made to a court, arbitral tribunal or other competent authority, which might affect the process (A/CN.9/896, para. 123). It is based on article VI of the New York Convention, which addresses the situation where a party seeks to set aside an arbitral award at the place of arbitration while the other party seeks to enforce it elsewhere. The Working Group agreed that article 20 should apply to both when enforcement of a settlement agreement was sought and when a settlement agreement was invoked as a defence (A/CN.9/934, para. 69).

For approval of article 6 at the sixty-eighth sessions of the Working Group, see A/CN.9/934, para. 70; for consideration of the matter at previous sessions, see A/CN.9/896, paras. 122–125; A/CN.9/867, paras. 168 and 169; and A/CN.9/861, paras. 103–107.

(vi) Footnotes

19. The Commission may wish to note that the following additional footnotes have been inserted in the draft amended Model Law:

- Footnote 2, which addresses the decision to replace the term "conciliation" by "mediation" throughout the draft instruments; footnote 2 reflects the explanatory text that was agreed for use when revising UNCITRAL texts on conciliation (see A/CN.9/934, para. 16; A/CN.9/929, paras. 102–104; and A/CN.9/867, para. 120). The Commission may wish to note that the first sentence of the explanatory text, which reads: "*'Mediation' is a widely used term for a process where parties request a third person or persons to assist them in their attempt to reach an amicable settlement of their dispute arising out of,*

or relating to, a contractual or other legal relationship." has not been inserted in footnote 2 in order to avoid possible confusion with the definition of mediation provided for in article 1(3) of the draft amended Model Law.

- Footnote 5 provides States with the options of (i) broadening the scope of section 3 to agreements not reached through mediation (for approval of footnote 5 at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 133–136; for consideration of the matter at previous sessions, see A/CN.9/929, paras. 68–72; A/CN.9/896, paras. 40 and 41; and A/CN.9/867, para. 115); and (ii) applying section 3 only to the extent that the parties to a settlement agreement have agreed to its application (thereby mirroring article 8(1)(b) of the draft convention; see A/CN.9/934, para. 137).

- Footnote 6 provides States with the option of adding a subparagraph to article 16(4) so that section 3 would apply to settlement agreements that are not international at the time of their conclusion, but that result from international mediation as defined under article 3, paragraphs 2 to 4 (A/CN.9/934, para. 127).

(vii) Other matters

(i) General Assembly resolution

20. The Commission may wish to note that the Working Group prepared both a draft convention and a draft amended Model Law in a spirit of compromise and to accommodate the different levels of experience with mediation in different jurisdictions. The Working Group agreed that a possible approach to address the specific circumstance of preparing both a convention and a model legislative text could be to suggest that the resolutions of the General Assembly accompanying those instruments would express no preference on the instrument to be adopted by States (A/CN.9/901, para. 93).

21. In that context, the Working Group agreed on the following wording for consideration by the Commission, and eventually recommendation to the General Assembly for inclusion in the relevant resolution: "*Recalling that the decision of the Commission to concurrently prepare a draft convention on international settlement agreements resulting from mediation and an amendment to the UNCITRAL Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions, and to provide States with consistent standards on cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument.*"

For consideration by the Working Group of the form of the draft instruments, see A/CN.9/901, paras. 52 and 89–93; and A/CN.9/896, paras. 135–143 and 211–213;

For approval of the draft text in para. 21 above at the sixty-eighth session of the Working Group, see A/CN.9/934, paras. 140–142.

(ii) Material accompanying the draft amended Model Law

22. The Commission may wish to note the recommendation of the Working Group that, resources permitting, the *travaux preparatoires* of the draft amended Model Law should be compiled by the Secretariat, so that they could be easily accessible and user-friendly. It was further recommended that the Secretariat should be tasked with the preparation of a text to supplement the Guide to Enactment of the Model Law (A/CN.9/934, paras. 146–148). In that light, the Commission may wish to consider whether the Guide to enactment should provide guidance on how sections 2 and 3 of the draft amended Model Law could each be enacted as a stand-alone legislative text.